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No. 834

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Supreme Court of the United States

OCTOBER TERM, 1967

READING COMPANY,

Appellant

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY OF APPELLANT READING COMPANY TO MOTIONS TO AFFIRM

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TABLE OF CONTENTS

	PAGE
Reading Acted to Obtain The Commission's Special Protection As Soon As It Realized It Needed That Protection and That Such Protection Was Available	6
Reading Never Conceded That The Merger Would Not Harm Its Ability to Serve The Public	2
Conclusion	8

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None of the parties has contested the legal duty of the Interstate Commerce Commission to consider the effect of this merger transaction upon adequate transportation service to the public. There is also no question that Reading provides the public with an essential transportation service. The principal issue joined is whether the Commission is warranted, under the peculiar facts of this case, in disregarding at this stage the effect of the merger on the future of Reading's service. Without conceding the relevancy of delay, some inaccuracies expressed or implied in appellees' version of the facts will be corrected.

The factual situation will also be brought up to date in the light of the Commission's Second Supplemental Report,

dated November 16, 1967 and issued November 21, 1967, copies of which are now on file with the Court, wherein the Commission denied Reading's request for the Appendix G conditions to offset traffic diverted by reason of inclusion of New Haven in Penn-Central.

Since so much emphasis is focused on the timing of Reading's request for protection, the contentions of appellees should also be evaluated in the perspective of time. It has been more than eighteen months since Reading first asked for protection equal to that of other small railroads. In this period, the Commission had ample opportunity to hear and consider Reading's evidence without any delay in the termination of its procceedings. And now that Reading is willing to be heard after consummation, delay is eliminated as an issue. Certainly, the risk that the public dependent upon Reading's service will be prejudiced unless Reading is adequately protected outweighs any slight inconvenience to the Commission and the parties if Reading is heard now.

READING ACTED TO OBTAIN SPECIAL PROTECTION AS SOON AS IT REALIZED IT NEEDED THAT PROTECTION AND THAT SUCH PROTECTION WAS AVAILABLE.

While Reading has admitted freely that it did not claim protection or inclusion during the first part of the proceedings because it believed that it too would soon be merged, the effort in the motions of the Government and Penn-Central to make it appear that Reading slept on its rights after Appendix G was created is not warranted by the record.

Reading asked for the Appendix G conditions as soon as it had knowledge of their existence. In its petition for reconsideration and further hearing filed promptly after the Appendix G conditions were first imposed, Reading

stated "that the affirmative finding that the Penn-Central merger will not be detrimental to Reading must be reconsidered after Reading is given an opportunity to show the effect of the Penn-Central merger upon it" and requested that it receive the protection of Appendix G if those conditions should be retained.[1]

Reading brought this action initially in the District Court to obtain an interluctory injunction which would postpone the merger until Reading was heard concerning the lawfulness of the protective conditions prescribed for others and the merit of its own claim for similar protective conditions. In its brief in the District Court, Reading explicitly argued that "if such indemnity conditions are to be prescribed for anyone, they must be prescribed for the . . . Reading" (p. 8).

When the case first reached this Court, Reading joined in the briefs and argument of the other unprotected railroads because it was in agreement with those railroads that the merger ought not to occur until the future of the protective conditions was resolved. Penn-Central's statement that Reading did not even "mention" that the Commission had refused to hear evidence showing that the protective conditions were essential to preserve adequate service for the public is incorrect (M.A. at 2).[2] Its position in this respect was specifically described in its joint brief as follows:

> "At the hearing currently being conducted on the formulation of protective conditions, the Commis-

[1]The United States, in contrast to its position here, replied to the petition of Reading and others by agreeing that the Commission should grant a rehearing to consider evidence that the Penn-Central merger will seriously injure them. Even when the case was last before the District Court, the United States agreed with Reading that the Commission was bound to consider Reading's objections "[i]f there were any merit to Reading's assertion". However, when it assumed the Commission's role and evaluated Reading's claim, it "found" Reading would not be adversely affected (Memorandum of United States served August 28, 1967, at 4).

[2]"M.A." refers to Penn-Central's Motion to Affirm.

> sion has refused even to receive evidence showing that Reading and CNJ would also suffer losses to such an extent that protective conditions are required to protect the public interest in adequate transportation service (I. C. C. Order in Finance Docket 21989 dated November 10, 1966). The Commission again relied upon a theory of laches (see J. S., App. B, p. 24). Such a theory has no place in the consideration of protection needed in the public interest. See *FTC* v. *Algoma Lumber Co.*, 291 U. S. 67, 80 (1934)." (Brief for Appellants, No. 642, at 28).

Penn-Central suggests that Reading is now carrying the standard borne by CNJ when the case was last here but discarded by that road when bankruptcy relieved it of the fetters of C&O-B&O control. CNJ is not in the appeal because it is negotiating protection from the merger. Penn-Central says that negotiations concern only protection from New Haven's inclusion in Penn-Central. However, Penn and Central have agreed to bring CNJ into the Penn-Central system if negotiations between CNJ and C&O-B&O for inclusion of CNJ do not secure CNJ's future.[3] This is the ultimate protection of CNJ whereof Reading spoke in its Jurisdictional Statement—a protection far greater than the

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[3] "In this connection, upon the initiative of the Trustees, negotiations have taken place with representatives of the Penn and the Central. Those roads have agreed that, if further negotiations with the C&O-B&O do not, reasonably promptly, result in an arrangement that will secure the future of the CNJ, the Penn and the Central would cooperate with the CNJ, through appropriate procedures that would not hinder consummation of the Penn-Central merger, to bring CNJ into the Penn-Central system. Final determination of the requirements of the public interest is, of course, for the Commission." (Reply Brief on behalf of Trustees of CNJ with respect to inclusion of the New Haven, Finance Docket No. 21989, et al., at 7).

interim protection afforded by Appendix G. Thus Reading is the only unprotected small road remaining.

Penn-Central's criticism of Reading's failure "to seek inclusion" in C&O-B&O at the time of the C&O-B&O Control case (317 I. C. C. 261 (1962)), the hearing in which terminated before the Penn-Central application was even filed, taxes Reading with an obligation to have foreseen that B&O's plans to merge with Reading would be supplanted by the N&W-C&O/B&O proposal.[4] At that time Penn, Central, the Commission and the industry generally expected three Eastern rail systems with Reading securely in the C&O-B&O System.

Penn-Central's representation that "Reading makes no attempt to explain" why it had every reason to expect protection from this and other mergers by inclusion in B&O cannot be taken seriously. These reasons—the long "family" relationship, joint Reading-B&O merger studies in 1963 and an increase in B&O's stockholdings in Reading while Penn-Central was before the Commission—are all detailed in Reading's petition in Western Maryland Control, attached as Appendix C to Reading's Jurisdictional Statement, and as an appendix to Reading's Second Supplemental Complaint.

The effort of Penn-Central to make it appear that Reading delayed in seeking the Appendix G conditions after they were invented is factually unsupported.

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[4]If the Commission properly prescribed conditions for PRR's subsidiary, Lehigh Valley, notwithstanding the absence of any request, because Lehigh Valley, as Penn-Central suggests (n. 7 at 8), "might reasonably have been thought to be in no position adequately to represent its own separate interest", the Commission might well have done the same for Reading in C&O-B&O Control or even in Western Maryland Control. Reading's petition to bind C&O-B&O in the latter case has been before the Commission for more than seven months. So far, the Commission has refused to hear Reading in *any* proceeding.

READING NEVER CONCEDED THAT THE MERGER WOULD NOT HARM ITS ABILITY TO SERVE THE PUBLIC

It is contended by both the Government and Penn-Central that Reading conceded that it would not be seriously affected by the merger. This is based solely on a letter of Reading's President concerning a *single* category of traffic at *one* interchange point. There is no statement in that letter that other traffic will not be affected; and if there were such a statement it would be wrong. Actually that single category alone would produce an annual revenue loss to Reading of about $2.7 million which could be disastrous to a company whose present operating deficit is in excess of $5 million for the first nine months of this year.

The letter made no reference to the loss of traffic which Reading originated or terminated at points competitive with PRR for the simple reason that no study had then been made of that traffic.[5] The potential for diversion of this kind of traffic in Reading's case is enormous because Penn competes with Reading at just about every significant point on its system and, after the merger, Penn-Central will be able to provide single-line service with a large pool of modern equipment between Reading's territory and all the points now served by Central. When this kind of traffic is added to the other kinds of traffic which Reading could lose to the merged company, the total traffic loss could be $19.9 million annually.

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[5]The divertibility of traffic at points where there is face-to-face competition is more difficult to study than the losses of interchange traffic. Records of the latter are maintained in the regular course of business, but determination of the former requires detailed analysis and study. Since Reading-Central interchange records were on hand, Reading's President estimated how much of that traffic would be lost. But since it was not opposing the merger, it made no detailed study of its other divertible traffic.

The District Court, usurping the Commission's function, found Reading's evidence "scarcely persuasive" despite the Commission's refusal to hear it. The error of so doing is demonstrated by the Commission's reliance on the same kind of diversion study in its Second Supplemental Report dealing with New Haven's inclusion in Penn-Central. ~~"may reasonably be expected from NH's inclusion in the~~

In that report the Commission found that diversion of approximately $845,057 in annual revenues from Reading may reasonably be expected from NH's inclusion in the Penn-Central system" (p. 129). The Commission expressly included in this figure divertible forwarded or terminated traffic of Reading. This is precisely the same kind of traffic which Reading says would be heavily diverted as a result of the Penn-Central merger itself. But in its Second Supplemental Report, the Commission adhered to its prior position and refused to determine the cumulative effect of the merger and New Haven's inclusion in the transaction. If it had done so, it obviously would been compelled to find that Reading would suffer diversion of traffic in a volume so large as to require offsetting protection of the type in Appendix G.

The Commission's refusal to consider Reading's losses of traffic to Penn-Central for any purpose has resulted in an absurdity. There is now a specific finding that over $845,000 of Reading's traffic would be lost solely by reason of inclusion of New Haven. If, as contemplated, D&H is granted trackage rights over portion of the lines of Penn-Central which go right through the heart of Reading's territory, Reading will have a further additional loss of traffic. However, without the knowledge of how much traffic will be lost to Penn-Central, the impact of these additional sums cannot be evaluated.

The Commission's duty under the statute and the national transportation policy is to assure the existence of a system of transportation adequate to serve the needs of the public. Reading's role in that system cannot be known unless the Commission determines the net competitive effect on Reading of Penn-Central and other rail realignments. The Commission's findings concerning small segments of the total effect on Reading will not protect the public or attain the legislative objective.

CONCLUSION

For the foregoing reasons, the motions to affirm should be denied.

Respectfully submitted,

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